Nos. 94-1361, 94-1477

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IN THE

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OCTOBER TERM, 1994

MARJORIE ZICHERMAN, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF MURIEL A.M.S. KOLE, AND MURIEL MAHALEK,
Petitioners/Cross-Respondents,

v.

KOREAN AIR LINES CO., LTD.,
Respondent/Cross-Petitioner.

On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

MOTION OF PAN AMERICAN WORLD AIRWAYS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

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June 30, 1995

BEST AVAILABLE COPY

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---

MOTION OF PAN AMERICAN WORLD AIRWAYS, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

Pan American World Airways, Inc. ("Pan Am") moves for leave to file the attached brief as *amicus curiae* in support of respondent/cross-petitioner Korean Air Lines. While Korean Air Lines has consented to the filing of this brief, Marjorie Zicherman and Muriel Mahalek have not.

This case presents the issues of who are the appropriate claimants and what are the available elements of compensatory damages in wrongful death actions governed

by the Warsaw Convention.[1] For six decades, Pan Am was America's leading overseas carrier and was thus the U.S. airline most affected by the Convention. Pan Am's particular interest in this case stems from the fact that it is a defendant in cases arising out of the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. A jury has found that Pan Am engaged in "wilful misconduct" that allowed the bomb to be placed aboard the aircraft.[2] As a result, Pan Am is liable under the Convention to pay full compensatory damages for the deaths of passengers aboard Flight 103.

In the past six months, Pan Am has settled claims for the deaths of approximately 76 passengers aboard Flight 103, but claims for the deaths of approximately 135 passengers are still pending. Virtually all of the pending cases present the issue of whether damages for the loss of the decedent's society are available in a Warsaw Convention case, and the Plaintiffs' Committee in *Lockerbie* has filed an *amicus* brief arguing that loss-of-society damages should be available.

Pan Am agrees with Korean Air Lines that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. §§ 761-68, should provide the measure of damages in this case, but Pan Am has an interest that is different from that of Korean Air Lines. Under one analysis available to Korean Air Lines, DOHSA, by its own force, could apply directly to all air

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

[2] The judgment on the liability verdict was affirmed by a divided Court of Appeals, *In re Air Disaster at Lockerbie*, 37 F.3d 804 (2d Cir. 1994)("*Lockerbie II*"), and this Court denied Pan Am's petition for certiorari on January 23, 1995, 115 S.Ct. 934.

disasters that occur in or over the high seas. In the attached brief, Pan Am argues that the federal common law should supply the measure of damages for all wrongful deaths under the Warsaw Convention and that DOHSA should be borrowed as the source of that federal common law. In that event, DOHSA would provide a uniform law of damages whether an accident covered by the Convention occurs on or over dry land (such as at Lockerbie) or on or over the high seas.

Wherefore, Pan Am respectfully requests leave to file the attached brief.

Respectfully submitted,

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CASES:

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Agency Holding Corp. v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143 (1987) 18

Air France v. *Saks*, 470 U.S. 392 (1985) 7

American Export Lines, Inc. v. *Alvez*, 446 U.S. 274 (1980) 28

Baltimore & O. R. Co. v. *Baugh*, 149 U.S. 368 (1893) 15

Barkanic v. *General Admin. of Civil Aviation*, 923 F.2d 957 (2d Cir. 1991) 15

Benjamins v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979) 7

Boehringer-Mannheim Diagnostics, Inc. v. *Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985) 7

Boyle v. *United Technologies Corp.*, 487 U.S. 500 (1988) 16

Buonocore v. *Trans World Airlines, Inc.*, 900 F.2d 8 (2d Cir. 1990) 7

Bush v. *Lucas*, 462 U.S. 367 (1983) 22

City of Milwaukee v. *Illinois*, 451 U.S. 304 (1981) ... 22

Counts v. *Hospitality Employees, Inc.*, 518 N.W.2d 358 (Iowa 1994) 24

TABLE OF AUTHORITIES--Continued

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Eastern Airlines, Inc. v. *Floyd*, 499 U.S. 530 (1991) 7,9,12

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) 15

Forsyth v. *Cessna Aircraft Co.*, 520 F.2d 608 (9th Cir. 1975) 13

Gonzalez v. *New York City Housing Authority*, 572 N.E.2d 598 (N.Y. 1991) 24

Green v. *Bittner*, 424 A.2d 210 (N.J. 1980) 24

Harris v. *Polskie Linie Lotnicze*, 820 F.2d 1000 (9th Cir. 1987) 10

In re Air Crash at Washington, D.C., 559 F. Supp. 333 (D.D.C. 1983) 13

In re Air Crash Disaster Near Chicago, 644 F.2d 594 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981) 13

In re Air Disaster at Lockerbie, 928 F.2d 1267 (2d Cir.), *cert. denied*, 502 U.S. 920 (1991) .. 10,11,13,16

In re Air Disaster at Lockerbie, 37 F.3d 804 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 934 (1995) 2,17

In re Disaster at Detroit Metropolitan Airport, 750 F. Supp. 793 (E.D. Mich. 1989) 14

In re Korean Air Lines Disaster, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991) 10

In re Mexico City Aircrash, 708 F.2d 400 (9th Cir. 1983) 7

TABLE OF AUTHORITIES--Continued

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Johnson v. *Continental Airlines Corp.*, 964 F.2d 1059 (10th Cir. 1992) 13

Joy v. *Bell Helicopter Textron, Inc.*, 999 F.2d 549 (D.C. Cir. 1993) 24

Kamen v. *Kemper Financial Services, Inc.*, 500 U.S. 90 (1991) 16

Kohr v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975) 14

Lampf, Pleva, Lipkind, Prupis & Petigrow v. *Gilbertson*, 501 U.S. 350 (1991) 18

Lauritzen v. *Larsen*, 345 U.S. 571 (1953) 15

Michigan Central R. Co. v. *Vreeland*, 227 U.S. 59 (1913) 21

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990) 21,27,28

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978) . . . . . *passim*

Moragne v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970) 17,18

Musick, Peeler & Garrett v. *Employers Insurance of Wausau*, 113 S.Ct. 2085 (1993) 15

North Star Steel Co. v. *Thomas*, 115 S.Ct. 1927 (1995) 18

Northwest Airlines, Inc. v. *Transport Workers*, 451 U.S. 77 (1981) 14,15,22,27

TABLE OF AUTHORITIES--Continued

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Offshore Logistics, Inc. v. *Tallentire*, 477 U.S. 207 (1986) 12

O'Melveny & Myers v. *FDIC*, 114 S.Ct. 2048 (1994) 16

Preston v. *Hunting Air Transport Ltd.*, [1956] 1 Q.B. 454 10

Schweiker v. *Chilick*, 487 U.S. 412 (1988) 22

Sea-Land Services, Inc. v. *Gaudet*, 414 U.S. 573 (1974) ..... *passim*

Slater v. *Mexican National R. Co.*, 194 U.S. 120 (1904) 15

St. Paul Ins. Co. v. *Venezuelan International Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987) 7

Still by Erlandson v. *Baptist Hosp., Inc.*, 755 S.W.2d 807 (Tenn. Ct. App. 1988) 24

Swift v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842) 4,14

Texas Industries, Inc. v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) 22

Textile Workers v. *Lincoln Mills*, 353 U.S. 448 (1957) 15

Tramontana v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 943 (1966) 15

United States v. *Gilman*, 347 U.S. 507 (1954) 22

TABLE OF AUTHORITIES--Continued

Page

United States v. *Standard Oil Co.*, 332 U.S. 301 (1947) 22

Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) 17,21

TREATIES & STATUTES:

Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note: .... *passim*

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Article 22, 49 Stat. 3019 7
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Article 28(1), 49 Stat. 3020 7
Article 28(2), 49 Stat. 3021 8
Article 29, 49 Stat. 3021 7,8

"Montreal Agreement," 49 U.S.C. App. § 1502 note 7

Damages (Scotland) Act 1976, ch. 18, §§ 1(4), 10(2) 26

Death on the High Seas Act, 46 U.S.C. App. §§ 761-68 (1988) ..... *passim*

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§ 2, 46 U.S.C. App. § 762 21
§ 7, 46 U.S.C. App. § 767 12

TABLE OF AUTHORITIES--Continued

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Fatal Accidents Act, 1976, ch. 30, § 1A, *as amended by* Damages for Bereavement Order 1990, S.I. 1990 No. 2575 (applicable in England and Wales) 26

Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1988) ..... *passim*

§ 1, 45 U.S.C. § 51 20

Jones Act, 46 U.S.C. App. § 688 (1988) ..... *passim*

Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 909(d) (1988) 20

Lord Campbell's Act, 9 & 10 Vict., ch. 93 (1846) . 4,17

Alaska Stat. § 09.55.580(a) (1994) 19

Ariz. Rev. Stat. Ann. § 12-612(A) (1994) 19,24

Ariz. Rev. Stat. Ann. § 12-613 (1994) 19,24

Colo. Rev. Stat. § 13-21-203 (1994) 25

Haw. Rev. Stat. § 663-3 (1994) 19

Idaho Code § 5-311(2)(b) (1994) 19

Ill. Rev. Stat. ch. 740, ¶ 180/2 (1995) 25

Ind. Code Ann. § 34-1-1-8(a), (e) (Burns 1994) 24

Iowa Code § 633.336 (1995) 19

Kan. Stat. Ann. § 60-1903 (1994) 25

Ky. Rev. Stat. Ann. § 411.135 (Michie 1994) 24

La. Civ. Code Ann. art. 2315.2 (West 1995) 19

TABLE OF AUTHORITIES--Continued

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Mass. Ann. Laws ch. 229, § 1 (Law. Co-op. 1995) .. 19

Mass. Ann. Laws ch. 229, § 2 (Law. Co-op. 1995) .. 13

Me. Rev. Stat. Ann. tit. 18-A, § 2(804)(B) (West 1994) 19,25

Mich. Stat. Ann. § 27A.2922(3), (6) (1993) 25

Miss. Code Ann. § 11-7-13 (1993) 19,25

Nev. Rev. Stat. Ann. § 41.085(1)-(4) (Michie 1994) 25

N.H. Rev. Stat. Ann. § 556:13 (1994) 25

N.M. Stat. Ann. § 41-2-3 (Michie 1994) 19

N.Y. Estates, Powers and Trust Law § 5-4.4 (Consol. 1994) 13

N.D. Cent. Code § 32-21-03 (1993) 19,24

Ohio Rev. Code Ann. § 2125.02(A), (B) (Anderson 1994) 25

Okla. Stat. tit. 12, § 1053(B) (1995) 24

Okla. Stat. tit. 12, § 1055 (1995) 24

Or. Rev. Stat. § 30.020(2)(d) (1994) 24

42 Pa. Cons. Stat. § 8301(B) (1994) 19

Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a) (West 1995) 19,24

Vt. Stat. Ann. tit. 14, § 1492(b) (1994) 24

Wash. Rev. Code Ann. § 4.20.020 (Michie 1994) ... 19

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Wash. Rev. Code Ann. § 4.24.010 (Michie 1994) . . . 24

Wash. Rev. Code Ann. § 4.56.250 (Michie 1994) . . . 25

W. Va. Code § 55-7-6(b), (c) (1994) 25

Wis. Stat. § 895.04(4) (1994) 25

CONGRESSIONAL MATERIALS:

Sen. Comm. on Foreign Relations, Sen. Exec. Doc. G, 73d Cong., 2d Sess. (1934) 14

78 Cong. Rec. 11577 (1934) 14

OTHER AUTHORITIES:

Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 Air L. Rev. 25 (1936) 11

1 E. Cohn & W. Zdzieblo, Manual of German Law ¶ 323 (2d ed. 1968) 25

2 D. Dobbs, Law of Remedies § 8.3(5) (2d ed. 1993) 23

H. Drion, Limitation of Liabilities in International Air Law (1954) 11

Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881 (1986) 15

Friendly, *In Praise of Erie -- And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383 (1964) . 14,15

G. Gilmore & C. Black, Law of Admiralty (2d ed. 1975) 23

TABLE OF AUTHORITIES--Continued

Page

D. Goedhuis, National Airlegislations and the Warsaw Convention (1937) 9,11

Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air L. 66 (1981) 9,11

C. Hodges, Product Liability: European Laws and Practice (1993) 25

International Technical Committee of Legal Experts on Air Questions, Report of Third Session, May 1928 (F. Sautman trans. 1976) 9

Lowenfeld, *Mass Torts and Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157 13,14

R. Mankiewicz, The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System (1981) 10,11

N. Matte, Treatise on Air-Aeronautical Law (1981) 11

H. McGregor, *Personal Injury and Death*, in 11 International Encyclopedia of Comparative Law, ch. 9, § 41 (A. Tunc. ed.) 25

G. Miller, Liability in International Air Transport: The Warsaw System in Municipal Courts (1977) 11

Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797 (1957) 15

TABLE OF AUTHORITIES--Continued

Page

E. Scoles & P. Hay, Conflict of Laws (2d ed. 1992) 8

Second International Conference on Private Aeronautical Law, Warsaw, 1929, Minutes (R. Horner & D. Legrez trans. 1975) 9

Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role for Federal Common Law?*, 54 Fordham L. Rev. 167 (1985) 14

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On Writs of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR PAN AMERICAN WORLD AIRWAYS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT/CROSS-PETITIONER

INTEREST OF *AMICUS CURIAE*

Pan American World Airways, Inc. ("Pan Am") submits this brief as *amicus curiae* in support of respondent/cross-petitioner Korean Air Lines. For six decades, Pan Am was America's principal overseas carrier and was thus the U.S. airline most affected by the Warsaw Convention.[1] Pan

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[1] Convention for the Unification of Certain Rules Relating to International Transportation by Air, *done* at Warsaw, Oct. 12, 1929, 49 Stat. 3000, *reprinted at* 49 U.S.C. App. § 1502 note.

Am's interest in the issues at bar derives from the terrorist bombing of Pan Am Flight 103 over Lockerbie, Scotland. A jury has found that Pan Am engaged in "wilful misconduct" that allowed the bomb to be placed on board the aircraft.[2] As a result, Pan Am is liable under the Convention to pay full compensatory damages for the deaths of the passengers aboard Flight 103.

In the past six months, Pan Am has settled claims for the deaths of approximately 76 passengers aboard Flight 103, but claims for the deaths of approximately 135 passengers are still pending. Virtually all of the pending cases present the issue of whether damages for the loss of the decedent's society are available in a Warsaw Convention case.

Pan Am agrees with Korean Air Lines that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. §§ 761-68, should provide the measure of damages in this case. Under one analysis available to Korean Air Lines, DOHSA, by its own force, could apply directly to all air disasters in or over the high seas. Pan Am's special and separate concern is that DOHSA be borrowed as the federal common law of damages so that there will be a uniform remedy for all cases arising under the Warsaw Convention, including those where the accident occurred on or over dry land, as at Lockerbie.

SUMMARY OF ARGUMENT

I. Plaintiffs have misinterpreted the scope and function of Articles 17 and 24 of the Warsaw Convention. Article 17 creates a cause of action for wrongful death and personal

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[2] The judgment on the liability verdict was affirmed by a divided Court of Appeals, *In re Air Disaster at Lockerbie*, 37 F.3d 804 (2d Cir. 1994) ("*Lockerbie II*"), and this Court denied Pan Am's petition for certiorari on January 23, 1995, 115 S.Ct. 934.

injury by making the international carrier "liable for damage sustained in the event of the death or wounding of a passenger." The phrase "damage sustained" does not specify the items of compensatory damages that may be recovered, as plaintiffs contend.

While the framers of the Convention initially considered providing an international choice-of-law rule for damages, they eventually abandoned that plan. Instead, the drafters provided that the measure of damages for the cause of action shall be chosen by the national law of the forum. Thus, Article 24 states that the terms of Article 17 and the conditions and limitations set out in other articles do not govern questions as to "the persons who have the right to bring suit and what are their respective rights." The Convention's Reporter, Henri De Vos, explained that questions as to who constitute the class of beneficiaries and "what are the damages subject to reparation" should be "regulated *independently* from the present convention."

II. Faced with the need to choose and apply a national or local measure of damages, the Second Circuit has held that the federal common law of damages applies. While this holding is not at issue here, it is important because many of the reasons that support the application of the federal common law also point to the Death on the High Seas Act as the proper source of that common law. In particular, the adoption of a federal common law of damages ensures that interests of uniformity will not be shattered by federal courts applying state laws having widely divergent rules governing who qualify as beneficiaries and what types of damages are recoverable.

Here, the cause of action arises from a treaty and thus is federal in character. When the treaty was ratified by the United States, the Congress did not adopt implementing

legislation that would fill the gaps that the Convention intentionally left for national law. Instead, Congress left the task of gap-filling to the courts. At that time, 1934, the federal courts applied the general common law under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), and thus could be expected to develop a uniform body of law governing damages and other issues that the Convention left to national law. The Second Circuit's reliance on the federal common law of damages to fill the gap created by Article 24(2) plainly serves the interest of uniformity and fulfills the expectation of those who drafted and ratified the Convention.

III. In developing federal common law remedies, courts, if possible, are to draw upon federal statutes where Congress has already balanced the competing values and policies. But, in selecting the source of the federal common law of damages for wrongful death claims under the Convention, the Second Circuit disregarded three federal statutes that provide damages for wrongful death, and chose instead to look to the wrongful death actions under "general maritime law." In doing so, the court chose the most amorphous, most criticized, and least utilized source for the common law.

Wrongful death has always been a creature of statute, starting with Lord Campbell's Act. Wrongful death statutes are especially helpful in defining the class of persons who are the proper beneficiaries or claimants in a wrongful death case. The statutes also reflect a legislative balance between the breadth of the class of beneficiaries and the measure of damages that may be recovered.

Because the Court of Appeals laid aside DOHSA and two other federal statutes governing wrongful death claims, it found itself obliged to draw the lines limiting who may recover. This led the court to its "financial dependency"

requirement, a line somewhat different from the line that Congress drew in DOHSA and the other federal statutes. It also led the Court of Appeals to recognize loss of society as an element of damages even though all wrongful death statutes enacted by Congress exclude this element and limit a claimant's recovery to pecuniary losses.

Mobil Oil Corp. v. *Higginbotham*, 436 U.S. 618 (1978), requires that courts take DOHSA as their "primary guide" in refining a "nonstatutory death remedy" because reliance on the federal statute will serve the interest of uniformity and will give proper deference to considered judgments of Congress. When the Second Circuit relied instead on general maritime law, as set out in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974), it unnecessarily intruded upon the policy determinations of Congress that are to be respected by the courts in developing federal common law. In addition, the Second Circuit's selection of *Gaudet* over the statutes is inconsistent with the efforts of this Court and others to bring as much uniformity as possible to the field of maritime law. *Gaudet* is now a sport, limited to the wrongful death of a single class of workers -- longshoremen -- if they are killed within territorial waters of the United States. In lieu of embracing this anomaly as the source of the federal common law of damages, the court below should have borrowed the schedule of beneficiaries and the measures of damages from DOHSA, a generally applicable law that applies to the deaths of both passengers and workers.

ARGUMENT

The Warsaw Convention creates a cause of action for wrongful death in international air carriage and prescribes many of the elements of that action; but, as we show in Part I, the Convention looks to the national law of each signatory to resolve the questions of (1) who are the

appropriate beneficiaries in a wrongful death action and (2) what is the measure of their compensatory damages. The state law is in disarray on these two questions, and the Court of Appeals, as we show in Part II, properly chose federal common law to resolve those two questions. Finally, as we show in Part III, the Death on the High Seas Act should be the source of this federal common law.

I. THE WARSAW CONVENTION CREATES A CAUSE OF ACTION FOR THE WRONGFUL DEATH OF PASSENGERS AND EXPLICITLY LEAVES TO NATIONAL LAW THE DECISIONS AS TO WHO ARE THE APPROPRIATE BENEFICIARIES AND WHAT ARE THE AVAILABLE ELEMENTS OF DAMAGES.

The Zicherman petitioners and their *amici*[3] contend that Article 17 of the Convention grants damages for loss of society because Article 17 makes carriers liable for all "damage sustained."[4] (Zich. Br. 7-9; Lock. Pl. Br. 9-10; Dooley Br. 7-11.) This argument fails to take account of Article 17's place in the Convention and, more importantly, the language and drafting history of Article 24.

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[3] Petitioners/cross-respondents will be referred to as "the Zicherman petitioners" and their brief as "Zich. Br." The *amicus* briefs for Philomena Dooley *et al.* and the Plaintiffs' Committee in *Lockerbie* will be referred to as "Dooley Br." and "Lock. Pl. Br.", respectively. Collectively, we refer to the other side as "plaintiffs."

[4] Article 17 states:

> "The carrier shall be liable for damage sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking."

The Convention creates a federal cause of action for personal injury and wrongful death. *Eastern Airlines, Inc.* v. *Floyd*, 499 U.S. 530, 533 n.2 (1991).[5] Article 17 prescribes the basic prerequisites for carrier liability. There must be an "accident" (as defined in *Air France* v. *Saks*, 470 U.S. 392 (1985)) that causes "death, physical injury, or physical manifestation" (*Floyd*, 499 U.S. at 552) to a passenger who is on board the aircraft or embarking onto or disembarking from the aircraft (see, *e.g.*, *Buonocore* v. *Trans World Airlines, Inc.*, 900 F.2d 8 (2d Cir. 1990)).

Other provisions of the Convention set out additional elements and conditions of the Warsaw cause of action: the international nature of the flight (Art. 1), the limitations on the liability of the carrier (Art. 22),[6] the circumstances in which these limitations on liability may be lifted (Art. 25), the fora where suit may be brought (Art. 28(1)), and the time limitation for filing such an action (Art. 29).

While the Convention sets out many substantive requirements for wrongful death actions, it also explicitly looks to the forum (*i.e.*, national law) to choose and supply other necessary law. For example, the Convention expressly incorporates the law of the forum to determine the legal effect, if any, of the passenger's own negligence (Art. 21), to

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[5] Accord, *e.g.*, *Benjamins* v. *British European Airways*, 572 F.2d 913 (2d Cir. 1978), *cert. denied*, 439 U.S. 1114 (1979); *Abramson* v. *Japan Airlines Co.*, 739 F.2d 130 (3d Cir. 1984), *cert. denied*, 470 U.S. 1059 (1985); *Boehringer-Mannheim Diagnostics, Inc.* v. *Pan American World Airways, Inc.*, 737 F.2d 456 (5th Cir. 1984), *cert. denied*, 469 U.S. 1186 (1985); *In re Mexico City Aircrash*, 708 F.2d 400 (9th Cir. 1983); *St. Paul Ins. Co.* v. *Venezuelan International Airways, Inc.*, 807 F.2d 1543 (11th Cir. 1987).

[6] As supplemented by the "Montreal Agreement" (49 U.S.C. App. § 1502 note), the Convention generally limits damages to $75,000 per passenger.

resolve questions of procedure (Art. 28(2)), and to determine how compliance with the time limitation is to be calculated (Art. 29).

In the context of this case, the most important provision incorporating national law is Article 24(2), which provides:

> "In the cases covered by article 17 the provisions of the preceding paragraph [that any action for damages can only be brought subject to the Convention's conditions and limitations] shall also apply, without prejudice to the questions as to *who are the persons who have the right to bring suit and what are their respective rights*." (Emphasis added.)

The Zicherman petitioners assert that "this Article refers only to procedural questions, not substantive ones," *i.e.*, who may sue and how any recovery is to be divided among potential plaintiffs. (Zich. Br. 15-16.) That assertion is belied by the Convention's Reporter, Henri De Vos; he told the Warsaw Conference that the issues of who can sue and what compensatory damages are available would be "regulated independently" from the Convention according to "private international law" (*i.e.*, national choice-of-law rules):[7]

> "The question was asked of knowing if one could determine *who the persons upon whom the action devolves in the case of death are, and what are the damages subject to reparation*. It was not possible to

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[7] "'Conflict of laws' is the term primarily used in the United States, Canada and more recently in England, while the Continental countries, and some writers in England . . . refer to 'private International Law.'" E. Scoles & P. Hay, Conflict of Laws § 1, at 1 (2d ed. 1992).

> find a satisfactory solution to this double problem, and the CITEJA esteemed that this question of private international law should be *regulated independently from the present Convention*."[8]

The De Vos report is borne out by the early work of CITEJA (Comité International Technique d'Experts Juridiques Aériens), the committee of experts who prepared the initial draft of the treaty considered by the delegates to the Warsaw Conference. *Floyd*, 499 U.S. at 542-43. CITEJA considered a provision that would, in the case of the death of a passenger, have applied the national law of the decedent's domicile as the measure of damages.[9] After debate, CITEJA determined to leave this matter to the forum court's own choice-of-law rules.[10]

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[8] Second International Conference on Private Aeronautical Law, Warsaw, 1929, Minutes, at 255 (R. Horner & D. Legrez trans. 1975) (emphasis added).

[9] A proposed Art. 27 would have provided:

> "In case of death of the rightful claimant, any action in responsibility, whatever it might be, can be exerted, in the conditions and limitations provided for by the present Convention, by the persons to whom this action belongs according to the deceased's national law, or, if unapplicable, according to that of the last place of residency." International Technical Committee of Legal Experts on Air Questions, Report of Third Session, May 1928, at 114 (F. Sautman trans. 1976)("CITEJA Minutes").

This history is also recounted in D. Goedhuis, National Airlegislations and the Warsaw Convention 270 (1937)("D. Goedhuis"); Haanappel, *The Right to Sue in Death Cases Under the Warsaw Convention*, 6 Air L. 66, 67 (1981)("Haanappel").

[10] CITEJA Minutes at 56. One commentator has explained this action as follows:

(continued...)

In short, petitioners' assertion that Article 17 itself gives them a right to recover damages for loss of society is refuted by Article 24(2) and its drafting history. That history shows that the Convention's drafters intended that Article 24 would leave the issue of what compensatory damages would be available to the "private international law" of the forum. This construction of Article 24 has been embraced almost uniformly by the courts[11] and the commentators.[12]

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[10] (...continued)

"In 1929 many countries, particularly amongst common law countries, had no rules on the survival of contractual rights, and wrongful death statutes, where they existed, varied greatly in scope and substance, *i.e.* with respect to the 'persons who have the right to bring suit' and to 'their respective rights'. In a matter so intimately intertwined with the national particularities of tort and family law, any attempt at unification of these rules was bound to lead nowhere." R. Mankiewicz, The Liability Regime of the International Air Carrier: A Commentary on the Present Warsaw System ¶ 187, at 161 (1981)("R. Mankiewicz").

[11] *E.g.*, *In re Air Disaster at Lockerbie*, 928 F.2d 1267, 1283 (2d Cir.) ("*Lockerbie I*") ("Commentators and case law are in accord that the Convention leaves the measure of damages to the internal law of parties to the Convention."), *cert. denied*, 502 U.S. 920 (1991); *In re Korean Air Lines Disaster*, 932 F.2d 1475, 1488 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991); *Harris* v. *Polskie Linie Lotnicze*, 820 F.2d 1000, 1002 (9th Cir. 1987). There is, however, an English trial court decision that relied upon Article 17 in awarding an element of non-economic damages not then available under English law. *Preston* v. *Hunting Air Transport Ltd.*, [1956] 1 Q.B. 454. This decision should not be followed because the court failed to consider Article 24.

[12] See H. Drion, Limitation of Liabilities in International Air Law ¶ 111, at 125-26 (1954)("[I]t is certain that the matter of measure of damages for death or injuries was intended [by the Warsaw Convention, *inter alia*] to be left to the applicable law."); D. Goedhuis at 269 ("The Warsaw Convention did not wish to determine the persons who have the right to bring an action in the event of the death . . . [of a] passenger, or to what degree the carrier

(continued...)

Consequently, the issue of whether petitioners may recover loss of society damages is to be determined by the law chosen by American choice-of-law principles.

II. THE COURT OF APPEALS CORRECTLY DETERMINED THAT FEDERAL COMMON LAW SHOULD BE APPLIED IN WRONGFUL DEATH ACTIONS UNDER THE WARSAW CONVENTION.

Because Article 24(2) directs the forum court to apply its national law to select the measure of damages, the federal courts have been required either to develop a federal choice-of-law rule that picks and chooses among the various state laws relating to damages or to adopt federal common law as the measure for damages for wrongful death in all cases arising under the Warsaw Convention. In *Lockerbie I*, the Second Circuit determined that claims for damages under the Warsaw Convention should be governed by federal common law. 928 F.2d at 1278-80. No plaintiff challenges this ruling by contending that state law should govern. The issue, as framed by the parties, is whether the Second Circuit should have borrowed the schedule of beneficiaries and the elements of damages from the Death on the High Seas Act

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[12] (...continued)
should indemnify."); R. Mankiewicz ¶ 187, at 161 ("... Article 24(2) leaves a gap with respect to the persons entitled to compensation and to the amount and kind of compensation when the passenger has died in or as a result of an accident."); N. Matte, Treatise on Air-Aeronautical Law ¶ 163, at 403 (1981)("It would have been better if the Convention had specified what kind of damage was envisioned: direct, indirect or simply moral."); G. Miller, Liability in International Air Transport: The Warsaw System in Municipal Courts 125 (1977); Haanappel at 67-69. The article cited by the Lockerbie plaintiffs (at 12) is not to the contrary. It acknowledges that "the Warsaw Convention does not concern itself with ... categories of damages ...." Cha, *The Air Carrier's Liability to Passengers in International Law*, 7 Air L. Rev. 25, 56 (1936).

as the federal common law of damages under the Convention or whether it should have borrowed general maritime law, as enunciated in *Sea-Land Services, Inc.* v. *Gaudet*, 414 U.S. 573 (1974).

If the Second Circuit had used a choice-of-law rule, rather than the federal common law of damages, it would have been required to apply DOHSA in this case. Section 7 of DOHSA, 46 U.S.C. App. § 767, preempts any state laws that might otherwise apply to wrongful deaths on the high seas. *Offshore Logistics, Inc.* v. *Tallentire*, 477 U.S. 207, 231-32 (1986). While such a choice-of-law analysis would provide a uniform and readily identifiable law for aviation accidents at sea, such as the Korean Air Lines disaster, it would introduce factual controversies and a plethora of competing laws from many jurisdictions in disasters on or above land or territorial waters.

One "stated purpose" of the Warsaw Convention was "achieving uniformity of rules governing claims arising from international air transportation."[13] *Floyd*, 499 U.S. at 552. Only application of federal common law of damages would further that purpose, inasmuch as use of state law on damages would lead to disparate and diverse results based sometimes on differences in state law and sometimes on whether the airplane made it to land or territorial waters before the deaths occurred. For example, if state law rather than federal common law of damages were employed, a court might apply the law of damages of each passenger's

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[13] The preamble to the Convention explicitly "recognize[s]the advantage of regulating in a uniform manner the conditions of international transportation by air in respect of . . . the liability of the carrier . . . ."

domicile.[14] In that event, deaths of passengers in the same aircraft would produce different recoveries depending upon whether the passenger was domiciled, for example, in Massachusetts (which allows non-pecuniary damages) or in New York (which does not allow non-pecuniary damages).[15] Moreover, in cases like that at bar, one would have disputes as to which of those two state laws should be applied when the decedent had residences in both states (J.A. 61-75). Finally, courts would have to struggle with what they have variously characterized as the "Syrtis bog" or "judicial nightmare" created by modern choice-of-law rules.[16] Federal common law pretermits the disputes, avoids the quagmire, and ensures that, in cases governed by the Warsaw Convention, the claims of U.S. citizens will receive uniform and equal treatment in U.S. courts.[17]

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[14] See, *e.g.*, *Johnson* v. *Continental Airlines Corp.*, 964 F.2d 1059, 1061 (10th Cir. 1992)(parties' stipulation in non-Warsaw case).

[15] Compare Mass. Ann. Laws ch. 229, § 2 (Law. Co-op. 1995) (allowing damages for loss of society and companionship) with N.Y. Estates, Powers and Trusts Law § 5-4.4 (Consol. 1994) (recovery limited to pecuniary injury). See also notes 23, 29-33 *infra* (describing differences among state laws).

[16] *Lockerbie I*, 928 F.2d at 1276; *Forsyth* v. *Cessna Aircraft Co.*, 520 F.2d 608, 609 (9th Cir. 1975). See also, *e.g.*, *In re Air Crash Disaster Near Chicago*, 644 F.2d 594 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); *In re Air Crash Disaster at Washington, D.C.*, 559 F. Supp. 333 (D.D.C. 1983). Professor Lowenfeld has written that "the airplane cases . . . seem to have made a parody not only of the conflict of laws but of the law of torts in general." Lowenfeld, *Mass Torts and the Conflict of Laws: The Airline Disaster*, 1989 U. Ill. L. Rev. 157, 158.

[17] Even in cases outside the Convention, lower courts and commentators have long urged that substantive federal law be applied to airline disaster cases. See, *e.g.*, *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400, 403 (7th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975)(cited approvingly in *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 90 (1981)); *In re Air Crash*

(continued...)

The Convention was adopted at a time and under circumstances that make it especially appropriate for the federal courts to fill in the gaps of the Convention by applying federal common law. The Convention on its face invited signatory nations to supply their own law in wrongful death actions to resolve at least five issues left open by the framers of the Convention (see pp. 7-8, *supra*); but the Congress chose not to enact implementing legislation that would fill those gaps. Instead, the Convention was ratified without debate in 1934,[18] thus leaving the implementation of this treaty entirely to the courts. At that time, the power and readiness of the federal courts to fill the gaps deliberately left in the Convention was undoubted. The general common law adopted under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), was in full play. Given that this general common law applied to accident claims against the most important carriers of that day, railroads, Congress could reasonably expect that this law would apply to accident

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[17] (...continued)
Disaster Near Chicago, 644 F.2d at 632-33; *In re Disaster at Detroit Metropolitan Airport*, 750 F. Supp. 793, 814 (E.D. Mich. 1989); Friendly, *In Praise of Erie -- And of the New Federal Common Law*, 39 N.Y.U. L. Rev. 383, 417-18 (1964); Lowenfeld, *supra* note 16, at 170-72; Vairo, *Multi-Tort Cases: Cause for More Darkness on the Subject, or a New Role For Federal Common Law?*, 54 Fordham L. Rev. 167 (1985).

[18] 78 Cong. Rec. 11577-82. The only contemporaneous explanation is a memorandum by Secretary of State Hull that President Roosevelt submitted to the Senate. It does not discuss the choice-of-law issue. Sen. Comm. on Foreign Relations, Sen. Exec. Doc. G, 73d Cong., 2d Sess. (1934).

claims against air carriers. See *Baltimore & O. R. Co.* v. *Baugh*, 149 U.S. 368 (1893).[19]

While *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), extirpated the federal *general* common law, it also cleared the way for the federal courts to develop a federal (not general) common law that would flesh out the meaning and application of those legal prescriptions that are federal in nature.[20] Thus, the federal courts have the power "to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress."[21] See also *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 95 (1981)(common-law development of "[b]roadly worded constitutional and

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[19] Moreover, applying federal common law would enable courts to apply U.S. law to accidents in foreign countries. See, *e.g.*, *Lauritzen* v. *Larsen*, 345 U.S. 571, 583 (1953). When the Convention was ratified by the U.S. in 1934, the established choice-of-law rule was *lex loci delicti*. Under that rule, state law could *not* govern the damages of a U.S. claimant where the accident occurred abroad. See, *e.g.*, *Slater* v. *Mexican National R. Co.*, 194 U.S. 120 (1904). Indeed, outside the Convention, foreign law is still applied to certain wrongful death claims of U.S. citizens in foreign air crashes. See *Tramontana* v. *S.A. Empresa de Viacao Aerea Rio Grandense*, 350 F.2d 468 (D.C. Cir. 1965)(choosing Brazilian law that limits damages for wrongful death to $170), *cert. denied*, 383 U.S. 943 (1966); *Barkanic* v. *General Admin. of Civil Aviation*, 923 F.2d 957 (2d Cir. 1991)(choosing Chinese law that limits damages for wrongful death to $20,000).

[20] See Friendly, *supra* note 17.

[21] Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. Pa. L. Rev. 797, 800 (1957). See, *e.g.*, *Musick, Peeler & Garrett* v. *Employers Insurance of Wausau*, 113 S.Ct. 2085, 2089 (1993); *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 457 (1957). See generally Field, *Sources of Law: The Scope of Federal Common Law*, 99 Harv. L. Rev. 881 (1986).

statutory provisions"). In recent times, moreover, this Court has recognized that "any common law rule necessary to effectuate a private cause of action under [a federal] statute is necessarily federal in character." *Kamen* v. *Kemper Financial Services, Inc.*, 500 U.S. 90, 97 (1991).

The private cause of action created by the Warsaw Convention is plainly "federal in character" (*id.*); and the "federal interest requires a uniform rule." *Boyle* v. *United Technologies Corp.*, 487 U.S. 500, 508 (1988). Given the Convention's explicit purpose of establishing uniformity of law for international aviation disasters, there would be a "'significant conflict between [this] federal policy or interest and the use of state law.'" *O'Melveny & Myers* v. *FDIC*, 114 S.Ct. 2048, 2055 (1994)(citation omitted). Thus, the cause of action created by the treaty should be implemented through the federal common law as the Second Circuit held in *Lockerbie I*.

III. THE DEATH ON THE HIGH SEAS ACT SHOULD BE THE SOURCE OF THE COMMON LAW APPLIED IN WRONGFUL DEATH ACTIONS UNDER THE WARSAW CONVENTION.

There are three federal statutes that provide a cause of action for wrongful death -- for seamen, the Jones Act (46 U.S.C. App. § 688); for railroad workers, the Federal Employers' Liability Act ("FELA" (45 U.S.C. §§ 51-60)); and for all persons killed upon the high seas, the Death on the High Seas Act. These statutes were adopted before the Warsaw Convention; they are similar in their definition of beneficiaries and virtually identical in the measures of damages that they adopt. Each act was intended to provide uniform rights and remedies for the deaths of persons who,

by the circumstance of their jobs or personal predilections, are engaged in travel.

In supplying the federal common law of damages under Article 24(2) of the Convention, the Second Circuit rejected DOHSA and the other federal statutes as the proper source of the federal common law and instead adopted the general maritime law as set out in *Gaudet*. Pet. App. A5-A6; *Lockerbie II*, 37 F.3d at 828-30. The lower court's choice of the governing law is contrary to the selection principles developed by this Court; it leads to unnecessary line-drawing by judges in areas where Congress has already drawn the necessary lines; and it promotes fragmentation rather than uniformity of law and results.

A. DOHSA Should Provide the Schedule of Beneficiaries for Death Actions Under the Warsaw Convention.

The Court has long recognized: "If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law." *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 69 (1966). That principle should apply with even greater force where a federal court embarks upon line-drawing in an area that has been the creature of statute since Lord Campbell's Act, 9 & 10 Vict., ch. 93 (1846).

"The one aspect of a claim for wrongful death that has no precise counterpart in the established law governing nonfatal injuries is the determination of the beneficiaries who are entitled to recover." *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 406 (1970). Some schedule of beneficiaries must be applied in wrongful death cases; otherwise, anyone who claims to have been injured by a passenger's

death, including business associates and friends, might be eligible to sue for damages.

When the Court first held in *Moragne* that there is a cause of action for wrongful death under the general maritime law, the United States urged that the Court borrow the schedule of beneficiaries from the Death on the High Seas Act. 398 U.S. at 407-08. While the Court acknowledged the strength of that argument, it determined that the "final resolution [of this issue] should await further sifting through the lower courts in future litigation." *Id.* at 408. After eight years of percolation, the Court, in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), definitively stated that in maritime cases "DOHSA should be the courts' primary guide as they refine the nonstatutory death remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." *Id.* at 624.

For the same reasons, DOHSA should be the source of the beneficiary schedule used in Warsaw actions. Some schedule must be used, and DOHSA provides a uniform schedule that reflects "Congress' considered judgment." The only alternative, borrowing the beneficiary schedules from state statutes, would install discrepancy in the rightful place of uniformity in Warsaw Convention cases.[22] As noted in

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[22] In the analogous situation of developing a statute of limitations, the courts avoid judicial line drawing and borrow from the closest state or federal statute. While often a state statute is used, this Court has borrowed a statute of limitations from federal law when that is "more in harmony with the objectives of the immediate cause of action." *North Star Steel Co. v. Thomas*, 115 S.Ct. 1927, 1931 (1995)(citing *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 362 (1991); *Agency Holding Corp.* v. *Malley-Duff & Associates, Inc.*, 483 U.S. 143, 153, 156 (1987)).

the margin, the state statutes set out detailed and divergent criteria as to when siblings may recover, if at all.[23]

Here the Court of Appeals rightly rejected any notion that it should borrow from the state wrongful death statutes. The court, however, erred in not borrowing from DOHSA, thus giving rise to the dependency issue that is presented in the Zicherman petition as one based on "general maritime law." As to Marjorie Zicherman, the dependency question is answered by DOHSA *if* its schedule of beneficiaries is applied in cases arising under the Warsaw Convention. DOHSA authorizes suit only by "the personal representative of the decedent . . . for the *exclusive benefit* of the decedent's *wife, husband, parent, child, or dependent relative* . . . ." 46 U.S.C. App. § 761 (emphasis added). If DOHSA were

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[23] Some statutes preclude recovery by siblings altogether. See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 12-612(A), 12-613 (1994) (in the absence of surviving spouse, children, or parents, recovery is on behalf of decedent's estate); Iowa Code § 633.336 (1995) (beneficiaries limited to surviving spouse and children); N.D. Cent. Code § 32-21-03 (1993) (action may be maintained by surviving spouse, children, or parents); 42 Pa. Cons. Stat. § 8301(B) (1994) (beneficiaries limited to surviving parents, children, or spouse of deceased); Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a) (West 1995) (same). Other state statutes allow siblings to recover only if they were dependent upon the decedent. See, *e.g.*, Alaska Stat. § 09.55.580(a) (1994) (siblings must be "dependent"); Haw. Rev. Stat. § 663-3 (1994) (siblings must be "wholly or partly dependant"); Idaho Code § 5-311(2)(b) (1994) (same); Wash. Rev. Code Ann. § 4.20.020 (Michie 1994) (siblings must be "dependent" and "within the United States"). Others allow recovery by siblings only if they are decedent's closest surviving relatives. See, *e.g.*, La. Civ. Code Ann. art. 2315.2 (West 1995) (siblings may recover only in absence of surviving spouse, children, or parents); Mass. Ann. Laws ch. 229, § 1 (Law Co-op. 1995) (siblings may recover in absence of surviving spouse, children, or parents); Me. Rev. Stat. Ann. tit. 18-A, § 2-804(B) (West 1994) (siblings as decedent's "heirs" in absence of surviving spouse or minor children); Miss. Code Ann. § 11-7-13 (1993) (siblings may recover only in absence of surviving spouse or children); N.M. Stat. Ann. § 41-2-3 (Michie 1994) (siblings may recover only in absence of surviving parent, spouse, children, or grandchildren).

adopted, Ms. Zicherman, as decedent's sister, would not be entitled to any damages unless she was dependent upon decedent.[24] Muriel Mahalek, as decedent's mother, would not have to prove dependency under DOHSA, but, as shown in the next section, her recovery would be limited to pecuniary losses.

Because the court below did not borrow from the federal statutes governing wrongful death claims, it created the need to draw lines that are not synchronized with any established body of statutory law. The court below, we submit, should have borrowed DOHSA's schedule of beneficiaries, and that schedule requires siblings, such as Ms. Zicherman, to prove dependency.

B. DOHSA Should Provide the Measure of Damages in Death Actions Under the Warsaw Convention.

Just as DOHSA should be the source of the schedule of beneficiaries in death actions under the Warsaw Convention, it should be the source of the damages law for death actions arising under the Warsaw Convention. The statutory

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[24] Consistent with DOHSA, neither the Jones Act nor the FELA would produce a different result for Ms. Zicherman. Those other two statutes also require a sibling to show dependency. The Jones Act, 46 U.S.C. App. § 688, incorporates by reference the beneficiary provisions of FELA; and the FELA provides that, in the case of the death of a railway employee, the railroad is liable to the employee's personal representative "for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, *if none, then of the next of kin dependent upon such employee*"). 45 U.S.C. § 51 (emphasis added). In the same vein, the Longshore and Harbor Workers' Compensation Act allows siblings to recover workers' compensation only if certain conditions are met, including that the siblings were "dependent upon the deceased at the time of the injury . . . ." 33 U.S.C. § 909(d).

schedule of beneficiaries and the statutory measure of damages in DOHSA reflect a balancing of synchronized interests. The court below, however, declined to borrow DOHSA's measure of damages. Relying on *Gaudet*, the Second Circuit held that dependents may recover damages for loss of society. In so doing, the court erred. The federal common law to be applied under the Warsaw Convention should be derived from congressional enactments rather than from a decision that has been so discredited by subsequent decisions that it has been limited to its facts.

1. The Court Should Defer to Congress' Determination That Damages for Wrongful Death Are Limited to the Claimant's "Pecuniary Loss."

DOHSA, as well as the Jones Act and the FELA, presented the court below with federal wrongful death statutes, all of which limited the claimants' recoveries to pecuniary losses and thus denied any recoveries for non-economic damages such as loss of society.[25] These statutes plainly constitute the "prime repository of federal policy and a starting point for federal common law" respecting the measure of damages for wrongful death. *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. at 69. In *Higginbotham*, moreover, the Court stated that "DOHSA should be the courts' primary guide as they refine the nonstatutory death

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[25] DOHSA declares that the plaintiff's recovery "shall be a fair and just compensation for the *pecuniary loss* sustained by the persons for whose benefit the suit is brought . . . ." 46 U.S.C. App. § 762 (emphasis added). *Higginbotham*, 436 U.S. 618, held that loss-of-society damages may not be recovered under this "pecuniary loss" standard. It is equally clear that loss-of-society damages may not be recovered under the Jones Act (*Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 32 (1990)) or the FELA (*Michigan Central R. Co.* v. *Vreeland*, 227 U.S. 59, 69-71 (1913)).

remedy, both because of the interest in uniformity and because Congress' considered judgment has great force in its own right." 436 U.S. at 624. In other areas of law, as well, the Court has a long history of deferring to Congress' choice of remedies and declining to supplement or augment those remedies.[26]

Whether death actions should allow for recovery of damages for loss of society calls for a resolution of competing policy considerations on which the legislative judgment should be paramount. Those factors to be considered were described in *Higginbotham*:

> "Courts denying recovery cite two reasons: (1) that the loss is 'not capable of measurement by any material or pecuniary standard,' and (2) that an award for the loss 'would obviously include elements of passion, sympathy and similar matters of improper character.' . . . Courts allowing the award counter:

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[26] See particularly *Bush* v. *Lucas*, 462 U.S. 367 (1983), where the Court declined to supplement the statutory backpay remedy even though that meant that an employee would receive no damages for emotional distress when his First Amendment rights were infringed (*id.* at 372 n.9). See also, *e.g.*, *Schweiker* v. *Chilicky*, 487 U.S. 412 (1988)(declining to allow additional damages remedy against officials who wrongfully terminate Social Security benefits); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630 (1981) (declining to supplement Clayton Act's treble-damage remedy with right to contribution); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77 (1981)(declining to supplement Title VII backpay remedy with right to contribution); *City of Milwaukee* v. *Illinois*, 451 U.S. 304 (1981)(federal common law on interstate water pollution supplanted by intervening enactment of Federal Water Pollution Control Act Amendments of 1972); *United States* v. *Gilman*, 347 U.S. 507 (1954)(declining to allow the Government to recover indemnity against an employee whose negligence had made it liable under the Federal Tort Claims Act); *United States* v. *Standard Oil Co.*, 332 U.S. 301 (1947)(declining to allow the Government to bring a claim in tort to recover its costs of caring for an injured soldier).

(1) that the loss is real, however intangible it may be, and (2) that problems of measurement should not justify denying all relief." 436 U.S. at 623 (citation omitted).[27]

Here, as in *Higginbotham*, this Court should take DOHSA as its "primary guide." The balance struck by Congress in DOHSA, the Jones Act, and the FELA is neither outmoded nor overtaken by a consistent body of state law or foreign law, as the Zicherman *amici* suggest.[28] With respect to state law, the various legislatures have arrived at a variety of answers for determining when, and under what conditions, relatives may obtain damages for loss of their decedent's society. Some states have reached the same conclusion as Congress and limited relief to pecuniary

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[27] In addition, the Court in *Higginbotham* quite properly questioned the plausibility of the loss-of-society award contemplated by *Gaudet*. *Gaudet* opined: "Loss of society must not be confused with mental anguish or grief, which is not compensable under the maritime wrongful-death remedy. The former entails the loss of positive benefits, while the latter represents an emotional response to the wrongful death." 414 U.S. at 585-86 n.17. Shortly after *Gaudet*, a leading text questioned this distinction. G. Gilmore & C. Black, Law of Admiralty 372 (2d ed. 1975)(describing footnote 17 in *Gaudet* as possibly "the least convincing footnote . . . in the history of our jurisprudence."). And, in *Higginbotham*, the Court, citing Gilmore & Black, stated that the "award contemplated by *Gaudet* is especially difficult to compute, for the jury must calculate the value of the lost love and affection without awarding damages for the survivors' grief and mental anguish, even though that grief is probably the most tangible expression of the survivors' emotional loss." 436 U.S. at 623 n.17. See also 2 D. Dobbs, Law of Remedies § 8.3(5), at 441-42 (2d ed. 1993)("Perhaps some jurors consciously endeavor to distinguish lost love from mental distress but it is difficult to believe that they are successful in doing so.").

[28] Lock. Pl. Br. 10-12, 16-20; Dooley Br. 20.

damages.[29] Some states limit awards of loss-of-society damages to specified relatives, excluding siblings.[30] Other states limit a parent's loss-of-society damages for the death of a child to the period of the child's minority.[31] Some

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[29] See *Gonzalez* v. *New York City Housing Authority*, 572 N.E.2d 598, 600-01 (N.Y. 1991)(loss of society damages not available for wrongful death cases); *Still by Erlandson* v. *Baptist Hosp., Inc.*, 755 S.W.2d 807, 813 (Tenn. Ct. App. 1988)(wrongful death statute "does not provide for recovery for grief or loss of consortium by the decedent's children" (citations omitted)); *Joy* v. *Bell Helicopter Textron, Inc.*, 999 F.2d 549, 565-66 (D.C. Cir. 1993) (District of Columbia does not award loss of society damages for wrongful death); compare *Green* v. *Bittner*, 424 A.2d 210, 215-16 (N.J. 1980)(limiting damages for loss of deceased child's companionship to pecuniary value of comparable services by caregiver).

[30] See, *e.g.*, Ariz. Rev. Stat. Ann. §§ 12-612(A), 12-613 (1994) (limited to surviving spouse, children, and parents); N.D. Cent. Code § 32-21-03 (1993) (limited to surviving spouse, children, or parents); Okla. Stat. tit. 12, §§ 1053(B), 1055 (1995) (same); Or. Rev. Stat. § 30.020(2)(d) (1994) (limited to surviving spouse, children, or parents or stepchildren or stepparents); Tex. Civ. Prac. & Rem. Code Ann. § 71.004(a) (West 1995) (limited to surviving spouse, children, or parents).

[31] See, *e.g.*, Ind. Code Ann. § 34-1-1-8(a), (e) (Burns 1994) (loss of companionship may be awarded parents of child who was unmarried, without dependents, and under 20 years of age (or under 23 years of age, if enrolled in school)); *Counts* v. *Hospitality Employees, Inc.*, 518 N.W.2d 358, 361 (Iowa 1994) (loss of society may be awarded to parents of child under 18 years of age); Ky. Rev. Stat. Ann. § 411.135 (Michie 1994) (parents may recover for loss of society for deceased child's minority); Okla. Stat. tit. 12, § 1055 (1995) (parents may recover damages for loss of companionship of unmarried and unemancipated minor child); Vt. Stat. Ann. tit. 14, § 1492(b) (1994) (pecuniary injuries for death of minor child include loss of child's companionship); Wash. Rev. Code Ann. § 4.24.010 (Michie 1994) (parents of deceased minor child or of an adult child on whom parents were dependent may recover damages for loss of the child's love and comanionship).

impose caps on awards of such damages.[32] Finally, some states generally allow relatives to recover such damages without an explicit statutory limit on recovery.[33]

Similarly, other nations that are signatories to the Warsaw Convention have not reached a consensus as to whether loss-of-society damages should be awarded in death actions. As plaintiffs point out, some civil-law countries allow non-pecuniary damages such as *dommage moral* in death actions; but others, such as Germany,[34] do not allow non-pecuniary damages in death actions.[35] Under English

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[32] See Colo. Rev. Stat. § 13-21-203 (1994) (cap of $250,000); Kan. Stat. Ann. § 60-1903 (1994) (cap of $100,000); Me. Rev. Stat. Ann. tit. 18-A, § 2-804(B) (West 1994) (cap of $75,000); Wash. Rev. Code Ann. § 4.56.250 (Michie 1994) (cap of "an amount determined by multiplying 0.43 by the average annual wage and by the life expectancy of the person incurring noneconomic damages"); Wis. Stat. § 895.04(4) (1994) (cap of $150,000). Compare N.H. Rev. Stat. Ann. § 556:13 (1994) (cap of $50,000 unless decedent is survived by a dependent relative).

[33] See, *e.g.*, Ill. Rev. Stat. ch. 740, ¶ 180/2 (1995); Mich. Stat. Ann. § 27A.2922(3), (6) (1995); Miss. Code Ann. § 11-7-13 (1993); Nev. Rev. Stat. Ann. § 41.085(1) - (4) (Michie 1993); Ohio Rev. Code Ann. § 2125.02(A), (B) (Anderson 1994); W.Va. Code § 55-7-6(b), (c) (1994).

[34] H. McGregor, *Personal Injury and Death*, in 11 International Encyclopedia of Comparative Law, ch. 9, § 41, at 17 (A. Tunc. ed.) ("H. McGregor")("[T]he GERMAN Civil Code starts . . . with the general rule that compensation is to be given only for material losses except where specific contrary provision is made (CC § 253) and then proceeds to make such specific contrary provision for personal injury but not for wrongful death . . . ."); C. Hodges, Product Liability: European Laws and Practice 370 (1993); 1 E. Cohn & W. Zdzieblo, Manual of German Law ¶ 323, at 161-62 (2d ed. 1968).

[35] See generally H. McGregor at 17: ("[A] middle solution allowing *dommage moral* for personal injury but disallowing it for wrongful death is favoured by a variety of legal systems, ranging from the SCANDINAVIAN to the ROMAN-DUTCH . . ." (citations omitted).

law, loss-of-society damages (called "bereavement") are the only non-economic damages that are allowed; and those damages are capped at £7,500 and restricted to a surviving spouse or to a surviving parent of an unmarried minor child.[36]

In short, contrary to the Lockerbie Plaintiffs' Committee (Lock. Pl. Br. at 10-12), there is no agreement either within or without the United States on when and under what conditions a claimant should recover damages for the loss of the decedent's society; and there certainly is no consensus as to whether the sister and mother of the decedent may recover loss-of-society damages when, as here, the decedent was a married adult.[37] Thus, as *Higginbotham* commends, the Court should adhere to the balance that Congress struck in the Death on the High Seas Act rather than reweigh the factors and come to its own, different resolution.

2. The Court Has Limited *Gaudet* to Its Facts and That Decision Should Not Be Extended to Cover Cases Arising Under the Warsaw Convention.

In holding that loss-of-society damages are available in Warsaw Convention cases, the Court of Appeals relied principally on *Sea-Land Services* v. *Gaudet*. In that case, the

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[36] Fatal Accidents Act, 1976, ch. 30, § 1A, *as amended by* Damages for Bereavement Order 1990, S.I. 1990 No. 2575 (applicable in England and Wales). In Scotland, only a spouse, parent, child, or foster child of a decedent may recover loss of society damages. Damages (Scotland) Act 1976, ch. 18, §§ 1(4), 10(2).

[37] The decedent's husband has prosecuted his own action in California, *Kole* v. *Korean Air Lines*, No. C-83-4038 (N.D. Cal.).

Court, by a 5-4 margin, ruled that the family of a longshoreman injured in the territorial waters could recover loss-of-society damages for his resulting death. 414 U.S. at 585-90.

The federal common law applicable to the Warsaw Convention should not be derived from *Gaudet*. Even though *Gaudet* was rendered in admiralty, "where the federal judiciary's lawmaking power may well be at its strongest . . . ," *Northwest Airlines* v. *Transport Workers*, 451 U.S. at 96, *Gaudet* has been cut back materially because, even in admiralty, the Court has a "duty to respect the will of Congress." 451 U.S. at 96 (citations omitted). Thus, this Court has in two later decisions limited *Gaudet* to its facts and restored DOHSA as the basic federal law governing wrongful death.

Mobil Oil v. *Higginbotham* ruled that *Gaudet*'s "holding . . . applie[d] only to coastal waters," and that, consistent with DOHSA, loss-of-society damages could not be awarded in accidents occurring on the high seas. The Court reasoned that "[i]n the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." 436 U.S. at 623, 625.

Miles v. *Apex Marine Corp.*, 498 U.S. 19 (1990), placed further limits on *Gaudet*. There a Jones Act seaman had been stabbed to death while his ship was in port. Even though the assault had occurred in the territorial waters, the Court held that the decedent's family could not recover damages for loss of society because those damages were not available under the Jones Act: "The logic of *Higginbotham* controls our decision here. *The holding of Gaudet applies only in territorial waters, and it applies only to longshoremen.* . . . We must conclude that there is no recovery for loss of

society in a general maritime action for the wrongful death of a Jones Act seaman." 498 U.S. at 31, 33 (emphasis added).

Gaudet is out of step with DOHSA, the Jones Act, *Higginbotham*, and *Miles*. Under DOHSA, the family of a passenger killed while aboard a vessel on the high seas may not recover loss-of-society damages. Similarly, the family of either a Jones Act seaman or a longshoreman killed on the high seas may not recover for loss of society. Finally, the family of a Jones Act seaman killed in the territorial waters may not recover damages for loss of society. Selecting *Gaudet* as the source of the federal common law of damages simply breeds additional discontinuities in the law.[38]

It makes little sense to reject DOHSA as the source of federal common law for death actions, in favor of a judicial decision that has been subsequently minimalized in deference to DOHSA. Moreover, when there is at hand a federal statute that governs deaths on two-thirds of the earth's surface -- namely, the high seas -- it is passing strange to say that air disasters, which may occur anywhere in the world, should be governed not by DOHSA, but by a judicial decision that applies only when a longshoreman is killed within three nautical miles of the U.S. coastline.

In short, DOHSA should serve as the source of the federal common law of damages for wrongful death actions under the Warsaw Convention.

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[38] Four members of the Court in *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274 (1980), argued that DOHSA and the Jones Act should not be accorded "overwhelming analogical weight" because the statutes are "hopelessly inconsistent with each other." *Id.* at 283 (citation omitted). On the issue of damages, however, DOHSA, the Jones Act, and the FELA are entirely consistent.

CONCLUSION

For the foregoing reasons, the judgment of the Second Circuit in this matter should be vacated and the case remanded with instructions to take the Death on the High Seas Act as the source for determining proper beneficiaries and available damages in a wrongful death action under the Warsaw Convention.

Respectfully submitted,

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